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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sprite Industries, Inc.

Serial No. 88460224

Mark B. Garred of Stetina Brunda Garred & Brucker,
for Sprite Industries, Inc.

Jessica Hilliard, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

Before Taylor, Shaw and Lynch,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Sprite Industries, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark REGENT for “shower heads, shower head filters, filtered shower heads, in-line shower heads, and hand-held shower heads with built-in filters,” in International Class 11.¹

¹ Application Serial No. 88460224 was filed on June 5, 2019, based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that it is likely to be confused with the mark in Registration No. 5432431, REGENCY (in standard characters) for, in relevant part, "faucets; metal sinks; kitchen sink sprayers," in International Class 11.² The Examining Attorney also required Applicant to properly sign and verify the application as mandated by 37 C.F.R. § 2.20. *See* 37 C.F.R. §§ 2.2(n), 2.33(a), (b)(2)-(c), 2.34(a)(2), (a)(3)(i), (a)(4)(ii); TMEP § 804.02 (Oct. 2018).

When the refusal and requirement were made final, Applicant appealed. With its reply brief, Applicant submitted a signed and verified declaration in support of the application. The appeal was suspended and the application remanded to the Examining Attorney for consideration of the declaration. Upon examination, the Examining Attorney found the declaration proper and the requirement for a properly signed and verified application satisfied. The appeal subsequently was resumed solely on the Section 2(d) refusal. We affirm.

I. Discussion – Applicable Law

Section 2(d) prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

² The registration issued March 27, 2018.

(CCPA 1973). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss below these and other relevant factors. *See In re Guild Mortg.*, 129 USPQ2d at 1162-63 (Board considers each *DuPont* factor for which there is evidence and argument).

A. Relatedness of the Goods

We first consider the goods under the second *DuPont* factor. In making our determination regarding their relatedness, we must look to the goods as identified in Applicant's application and the cited registration. *See Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018). It is well settled that the goods of Applicant and Registrant need not be identical or competitive to support a finding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d. 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Hilson Research, Inc. v. Soc'y for Human Resource Mgmt.*, 27 USPQ2d 1423 (TTAB 1993). The issue here, of course, is not whether purchasers would confuse the goods,

but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Applicant's goods are identified as "shower heads, shower head filters, filtered shower heads, in-line shower heads, and hand-held shower heads with built-in filters" and the Registrant's goods are identified as "faucets; metal sinks; kitchen sink sprayers." To show that the goods are related, the Examining Attorney made of record printouts from various websites showing that the same entity commonly provides one or more goods of the types identified in both the application (e.g., shower heads (including handheld shower heads) and shower filters) and the cited registration (e.g., faucets, sinks,³ and sink sprayers) under the same mark. "[I]t is settled that evidence of third-party use of the same mark for an applicant's identified goods and services (or similar goods or services) on the one hand, and an opposer's (or registrant's) identified goods and services (or similar goods and services) on the other, may establish a relationship between those goods and services. *Detroit Athletic*, 128 USPQ2d at 1051; *see also In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davia*, 110 USPQ2d 1810, 1815-17 (TTAB 2014); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). The record features the following marks:

³ We find "sinks" to include the more specific "metal sinks" identified in the cited registration.

Moen (www.moen.com⁴), Brondell (www.brondell.com⁵), Grohe (www.grohe.us/eh_us/bathroom/#⁶), Kohler (www.us.kohler.com⁷) and Speakman (www.speakman.com⁸).

The Examining Attorney also made of record copies of use-based, third-party registrations for marks covering items of the types identified in both Applicant's application and the cited registration.⁹ Third-party registrations that individually cover different goods and that are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. *See Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). The registrations include the following:

⁴ August 27, 2019 Office Action, TSDR 34-44 (complete Urls at citation). We have given limited value to the evidence relating to use of Delta in connection with both shower heads and faucets (*id.* at TSDR 10-33), because only shower heads are depicted in the evidence. Faucets are merely referenced on the webpages as a product type under the headings "Kitchen" and "Bathroom." Similarly, the webpages from eFaucets (*id.* at TSDR 47-58) only reference hand held showers and shower heads and thus have limited probative value.




⁵ March 2, 2020 Office Action, TSDR 24-41.

⁶ *Id.* at 42-51.

⁷ *Id.* at TSDR 52-64.

⁸ *Id.* at TSDR 65-70.

⁹ *Id.* at TSDR 10-23.

Registration No.	Mark	Relevant Goods ¹⁰
5977827	BEWITCH	Hand held shower heads and faucets and sinks
5983258		Shower heads and faucets
5984116	GIIWI	Shower heads and hand held shower heads and faucets
5990089		Shower heads, hand held showers and hand showers and tap water faucets
5990298		Hand held shower heads and shower heads and faucets, kitchen sinks, sinks and taps being faucets

We find the third-party use and registration evidence sufficient to show that Applicant's identified goods are related and complementary to Registrant's identified goods, some of which being plumbing fixtures that may be used together in a bathroom and which are sold by the same entity under the same mark.

We find unavailing Applicant's assertion that the goods are unrelated because Applicant's filtered shower heads occupy a "niche area of shower heads" "directed to bathroom/washroom use to facilitate personal hygiene and cleanliness," whereas the cited goods are "of a more mainstream nature and are specially related to general kitchen use." Applicant's brief p. 8.¹¹ The problem with the argument is that neither Applicant's application nor the cited registration contain any restrictions as to area of or type of use. Indeed, Applicant's identified goods includes plain "showerheads." An applicant may not restrict the scope of its goods or the scope of the goods covered

¹⁰ The registrations include additional goods that are not relevant to this appeal.

¹¹ 4 TTABVue 9.

in the cited registration by extrinsic argument or evidence. *See, e.g., In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986). As stated, the goods need not be identical; rather, they need only be related in such a manner that they could be encountered by the same consumer under situations that would lead to the mistaken belief that they originate from the same source. *Coach Servs.*, 101 USPQ2d at 1723. For the reasons explained, we find the respective goods related and complementary.

This second *DuPont* factor thus favors likelihood of confusion.

B. Channels of Trade and Classes of Consumers

We now consider the established, likely-to-continue channels of trade and classes of consumers, the third *DuPont* factor. As with the relationship between the goods, we likewise base our determination regarding the channels of trade and classes of purchasers on the goods as they are identified in the application and the cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's application and the cited registration contain no limitations as to channels of trade or classes of purchasers, and we decline to read a limitation into them. *Squirtco v. Tomy Corp.*, 697 F.2d 1030, 216 USPQ 937, 940 (Fed. Cir. 1983). Because there are no restrictions in either the application or cited registration, we must assume that the channels of trade would include the usual ones, including home improvement stores, and the classes of consumers would include the typical consumers for such goods, for example,

businesses and homeowners seeking various types of plumbing fixtures. The same third-party website evidence discussed above in connection with the relatedness of the goods shows that both Applicant's and Registrant's goods are sold in the same online retail trade channels. Accordingly, we find that the respective goods would be provided in overlapping channels of trade to overlapping classes of purchasers. This third *DuPont* factor also weighs in favor of finding a likelihood of confusion.

C. The Marks

Next, we consider the first *DuPont* factor relating to the similarity of the marks and compare Applicant's mark REGENT with the cited mark REGENCY. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion."); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). We also are mindful that "marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

In arguing against the refusal, Applicant maintains that “it’s [sic] mark and the [mark in] the cited registration are visually, phonetically and connotatively dissimilar....” Applicant’s brief p. 6.¹² We disagree.

As to appearance and sound, both marks are comprised of a single, similar length word that begins with the letter combination “REGEN.” REGENT and REGENCY vary by only the last letters, resulting in a similar appearance and sound. Slight differences in marks do not normally create dissimilar marks. *See Weiss Assoc., Inc. v. HRL Associates*, 902 F.2d 1546, 14 USPQ2d 1840, 1841 (Fed. Cir. 1990) (“It is especially hard to distinguish between TMS and TMM when the marks only differ by the last letter.”); *Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR). *See also In re Energy Telecomms. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983) (“Slight differences in the sound of similar marks do not avoid a likelihood of confusion.”). Moreover, given that the differences between the marks are at end of each, they may not be noticed or appreciated by the average consumer who normally retains a general, rather than specific, impression of trademarks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Further, even if potential consumers notice and recall the specific differences in the marks, the commercial impressions are so similar that those familiar with Registrant’s plumbing fixtures in the nature of, e.g., faucets, sold under the

¹² 4 TTABVue 7.

REGENCY mark, upon seeing Applicant's mark REGENT on complementary and related plumbing fixtures, i.e., shower heads, including filtered ones, are likely to assume that the two marks are variant marks that identify companion product lines from the same source.

In terms of connotation, Applicant contends that the overall impression conveyed by the marks is distinctly different. Applicant particularly argues that the Examining Attorney improperly relied on definitions for the word "regency" used as a noun, and having the meanings of: "the office, jurisdiction, or control of a regent" (www.dictionary.com/browse/regency)¹³ and "regent is a related term of regency" (<https://www.wikidiff.com/regent/regency>).¹⁴ However, as Applicant argues, "[w]hen considered as an adjective, the term 'regency' connotes a classical architectural style, which imparts a different commercial impression than the definition cited by the Examining Attorney (i.e., *noun* 'the office, jurisdiction, or control of a regent')." Applicant's brief p. 7.¹⁵

¹³ August 27, 2019 Office Action, TSDR 9.

¹⁴ March 2, 2020 Final Office Action, TSDR 7

¹⁵ 4 TTABVUE 8. In making this argument, Applicant relies on a definition of "regency" from MERRIAM-WEBSTER at (<https://www.merriam-webster.com/dictionary/regency>). Although Applicant included only a hyperlink to the definition, and a hyperlink is insufficient to make the webpage itself of record, *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013) (providing hyperlinks insufficient to make evidence of record), we nonetheless sua sponte take judicial notice of the definition from MERRIAM-WEBSTER. "Regency" is defined as "of, relating to, or characteristic of the styles of George IV's regency as Prince of Wales during the period 1811-20." The entry further expounds: "The Regency is remembered for its elegant architecture and fashions ... Today, hotels, furniture and businesses on both sides of the Atlantic carry the name 'Regency' to identify with the period's style," last visited May 5, 2021. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

We find this argument unavailing. While certain architecture, clothing and furniture styles may be describes as “regency style,” there is nothing in the record to show that plumbing fixtures are similarly labeled. Moreover, consumers may not appreciate the nuances in meaning conferred by the definitions of “regency” when viewed by part of speech, or even, as noted above, that the two marks are slightly different. That is, consumers are just as likely to perceive both marks as having the same meaning, i.e., either the regency style, or as an arbitrary term in relation to plumbing fixtures.

While we appreciate the differences between Applicant’s mark REGENT and the cited mark REGENCY when viewed on a side-by-side bases, when viewed in their entirety, we find that they are more similar than dissimilar and that they convey very similar connotations and commercial impressions.

The first *DuPont* factor thus favors a finding of likelihood of confusion.

D. Conclusion

We conclude that confusion is likely between Applicant’s REGENT mark for the identified shower heads and shower head filters and the cited REGENCY mark for the identified faucets, metal sinks, and kitchen sink sprayers. We conclude so principally due to the similarity of the marks, the related and complementary nature of the goods, and the overlap in trade channels and classes of purchasers.

Decision: The refusal to register Applicant’s mark REGENT under Section 2(d) is affirmed.